

FILED

JUN 19 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

JUAN DANIEL ZARCO,

Plaintiff - Appellant,

v.

McQUEEN; et al.,

Defendants - Appellees.

No. 03-16562

D.C. No. CV-01-00203-FCD/PAN

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Submitted June 12, 2006^{**}

Before: WALLACE, KLEINFELD, and BERZON, Circuit Judges.

California state prisoner Juan Daniel Zarco appeals pro se from the district court's order denying his application for leave to proceed in forma pauperis ("IFP") pursuant to 28 U.S.C. § 1915(a) and subsequent judgment of dismissal.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We have jurisdiction under 28 U.S.C. § 1291. We review for abuse of discretion the decision to deny leave to proceed IFP, and review de novo the determination that a complaint lacks arguable substance in law or fact. *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir. 1987). We vacate and remand.

The district court found that Zarco conceded that he failed to complete the grievance process as required by 42 U.S.C. § 1997e(a), and denied Zarco IFP status on this basis. However, in his amendment to his complaint and in his opposition filed with the district court on January 6, 2003, Zarco asserted that the prison failed to respond to his grievances. This may have rendered further remedy “unavailable.” *See Brown v. Valoff*, 422 F.3d 926, 943 n.18 (9th Cir. 2005) (observing that the exhaustion requirement should not be read so narrowly as to permit prison officials to exploit the requirement through indefinite delay in responding to grievances). Accordingly, we conclude that denial of IFP status based on failure to exhaust administrative remedies was improper. We vacate the order denying IFP status and subsequent judgment of dismissal, and we remand for further proceedings.

All pending motions are denied.

VACATED and REMANDED.